

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JEFFREY HUTCHINSON
and KEVIN ROGERS

Appeal 2008-0746
Application 10/624,062
Technology Center 1700

Decided: April 29, 2008

Before CHARLES F. WARREN, THOMAS A. WALTZ, and
PETER F. KRATZ, *Administrative Patent Judges*.

WARREN, *Administrative Patent Judge*.

DECISION ON APPEAL

Applicants appeal to the Board from the decision of the Primary Examiner finally rejecting claims 1 through 9 and 11 through 22 in the Office Action mailed October 31, 2005. 35 U.S.C. §§ 6 and 134(a) (2002); 37 C.F.R. § 41.31(a) (2006).

We affirm-in-part the decision of the Primary Examiner.

Claim 1 illustrates Appellants' invention of a process of manufacturing a yeast raised doughnut, and is representative of the claims on appeal:

1. A process of manufacturing a yeast raised doughnut, the process comprising the following steps performed in the sequence shown:

- (a) forming a proven dough mixture;
- (b) applying a first coating comprising a first cooking fat to said proven dough mixture;
- (c) baking said coated proven dough mixture to form a baked proven dough mixture; and
- (d) applying a second coating comprising a second cooking fat to said baked proven dough mixture while said baked proven dough mixture is still warm from said baking step to form said yeast raised doughnut.

The Examiner relies upon the evidence in these references (Ans. 2-3):

Averbach	US 5,130,150	Jul. 14, 1992
Loh	US 5,804,243	Sep. 8, 1998
Lonerган	WO 98/30105 A2	Jul. 10, 1998

Appellants rely upon the evidence in this reference of record (App.

Br. 17; Reply Br. 5):¹

Silva	US 4,293,572	Oct. 6, 1981
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Appellants request review of the following grounds of rejection under 35 U.S.C. § 103(a) advanced on appeal (App. Br. 2-3):
claims 1 through 9, 11, 12, and 15 through 20 as unpatentable over Lonerган in view of Averbach (Ans. 3); and

¹ We have not considered US 6,787,170 B2 cited by Appellants or arguments based thereon in the Appeal Brief and the Reply Brief. *See, e.g.*, App. Br. 13 n.3. This evidence was not entered or considered by the Examiner. In any event, it was not presented prior to filing the appeal or set forth in the Evidence Appendix to the Appeal Brief. 37 C.F.R. §§ 41.33(d)(2) and 41.37(c)(ix) (2005).

claims 13, 14, 21, and 22 as unpatentable over Lonergan in view of Averbach as applied to claims 1 through 9, 11, 12, and 15 through 20, further in view of Loh (Ans. 5).

Appellants argue “claims 1 and 15” and “claims 2 and 15” as representative of the claims in the first ground of rejection. App. Br., e.g., 7 and 19. The claims in the second ground of rejection are argued as a group. App. Br. 22. Thus, we decide this appeal based on claims 1, 2, 13, and 15 as representative of the grounds of rejection and Appellants’ groupings of claims. 37 C.F.R. § 41.37(c)(1)(vii) (2005).

The principal issues in this appeal are whether the Examiner has carried the burden of establishing a prima facie case in each of the grounds of rejection advanced on appeal which, of course, turn on the issues addressed below.

Several of the issues raised by the Examiner and Appellants involve the interpretation of claims 1, 2, 13, and 15. In this respect, we give the terms of these claims their broadest reasonable interpretation in their ordinary usage in the context of the claim as a whole as they would be understood by one of ordinary skill in the art, in light of the written description in the Specification, including the drawings, without reading into the claims any disclosed limitation or particular embodiment. *See, e.g., In re Am. Acad. Of Sci. Tech. Ctr.*, 367 F.3d 1359, 1364 (Fed. Cir. 2004), and cases cited therein; *In re Morris*, 127 F.3d 1048, 1054-55 (Fed. Cir. 1997).

Appellants contend the “forming a proven dough mixture” must be interpreted in part on the basis of this disclosure (Reply Br. 2):

The doughnut shapes are next transferred to a proving [sic, proving] room where heat and humidity are added for up to 45 minutes; in this specification a reference to ‘proving ‘ is to the

addition of heat and humidity. A reference to a proven product shall be interpreted accordingly.

Spec. 2:8-11. The remainder of Appellants' contention is based on this disclosure:

The shaped dough portions are then subjected to a proving step at 40-43°C (105 to 110°F) for 30 to 50 minutes with 55 to 60% relative humidity and left to cool for approximately 10 minutes. The proving step has the effect of increasing moisture content. This is followed by a cooling step.

Spec. 6:24-27.² We note that Appellants acknowledge the proofing step in the Specification at page 2 as part of a representative method of the prior art for making yeast raised doughnuts by deep frying. Spec. 1:23 to 2:16, and Fig. 1.

We determine the controlling disclosure is “in this specification a reference to ‘proving’ is to the addition of heat and humidity,” and accordingly, we interpret the subject claim language as requiring subjecting a yeast containing dough to any amount of “heat and humidity” for any period of time. Indeed, Appellants define the term “proving” with the general terms “heat and humidity.” Thus, we find no basis in the claim language, or in the disclosure in the Specification we quote above or elsewhere therein, on which to read the specific process parameters disclosed in the above quotes for the illustrative prior art process and for a disclosed process as limitations into the claims. *See, e.g., In re Zletz*, 893 F.2d 319, 321-22 (Fed. Cir. 1989).

We now consider the claim language term “warm” in the clause “while said baked proven dough mixture is still warm from said baking step

² Appellants incorrectly cite the Specification at page 4 for this disclosure. Reply Br. 2.

to form said yeast raised doughnut.” Appellants contend “90-100 degrees F. is warm maybe to a layman discussing a summer day but it is basically room temperature to a scientist or a person skilled in the art.” Reply Br. 5.

Appellants argue:

The person skilled in the art reading Appellant’s [sic] specification would have no doubt that warm is not meant to be room temperature but substantially higher because the specification in describing “warm” reads:

“The baking temperature may be varied between 210°C to about 280°C, preferably about 225°C to about 245°C, and more preferably 235°C. The post baking fat application step should be carried out while the dough is still warm, usually within 3 minutes of removal from the oven and preferably within 1 minute.”

Reply Br. 6. Thus, Appellants further argue that “‘warm’ in the present context as defined in the specification is a temperature of the doughnut surface a couple of minutes after it was cooked at 455 degrees F. which no reasonable person would expect to be anywhere near 90-100°F.” *Id.*

First of all, the quote from the Specification at Reply Brief page 6 is from two separate parts thereof. We find the first and second sentences at Specification page 8, lines 22-24, and page 10, lines 6-8, respectively. Second, we find no definition of the term “warm” in context per se in the Specification. With respect to Appellants’ contentions, we note that the common scientific meaning of the term “room temperature” is “from 20 to 25°C (68 to 77°F).”³ Similarly, Averbach, drawn to the application of edible moisture barriers to, among other things, cooked yeast raised doughnut

³ See, e.g., **room temperature**, *The Condensed Chemical Dictionary* 899 (10th ed., Gessner G. Hawley, ed., New York, Van Nostrand Reinhold Company, 1981).

products, discloses “70° F. (generally referred to as ‘room temperature’, e.g., about 50°-80° F.).” Averbach, col. 3, ll. 2-4.

On this record, we interpret the subject term “warm” in the context of the phrase containing the same, as the retention of heat from the baking step to any extent in the baked proven dough mixture. We find no definition for the term “warm” with respect to temperature or cooling time following the “baking step” in the Specification which, as quoted, simply discloses that “[t]he post baking fat application step should be carried out while the dough is still warm.” Thus, we find no basis in the claim language or in the disclosure in the Specification on which to read the specific process parameters disclosed in the Specification and otherwise argued by Appellants as limitations into the claims. *See, e.g., Zletz*, 893 F.2d at 321-22.

Considering now the phrase “at least one of said first coating and said second coating consists essentially of a cooking fat or a combination of cooking fats,” in claim 2, dependent on claim 1, we agree with Appellants (App. Br. 20) that the disclosure contains the definition of “consists essentially of cooking fat” as indicating “the formulation consists only of fats or oils as described above in any common grade or purity.” Spec. 7:22-26. Thus, on this record, the claim term “consisting essentially of” is defined by the Specification, and therefore, does not have its ordinary meaning in claim construction as the Examiner contends. Ans. 4. Independent claim 15 contains the language “consists essentially of” with the first and second cooking fats.

The language “wherein the step of baking said coated proven dough further comprises applying steam to said proven dough” of claim 13,

dependent on claim 1, is not limited by the claim language or the disclosure in the Specification. Thus, claim 13 further limits the process of claim 1 to include the application of steam in any manner at any point of the process.

These claims contain the open-ended term “comprising” as a transitional term and, in claims 1 and 13, in certain limitations in the body thereof, which term opens the claims to include processes having additional steps, reactants, and reaction parameters. *See, e.g., Exxon Chem. Pats., Inc. v. Lubrizol Corp.*, 64 F.3d 1553, 1555 (Fed. Cir. 1995) (“The claimed composition is defined as comprising - meaning containing at least - five specific ingredients.”); *In re Baxter*, 656 F.2d 679, 686 (CCPA 1981) (“As long as one of the monomers in the reaction is propylene, any other monomer may be present, because the term ‘comprises’ permits the inclusion of other steps, elements, or materials.”).

Turning now to the grounds of rejection, we find Lonergan would have disclosed to one of ordinary skill in this art a process of coating the upper surface of a shaped, unbaked, dough product with a coating or glaze that “is effective to impart a fried surface texture . . . when it is baked.” Lonergan, e.g., 2:10-13. The glaze can contain from “10 to about 80% edible oil” along with water and edible hydrophilic colloid, and can contain other ingredients. Lonergan, e.g., 2:18 to 3:6, 6:8 to 8:23.

The unbaked dough product to be coated or glazed can be “any unbaked dough product to which it is desirable to impart a fried texture without a frying step, *and/or* where it is desirable to increase the horizontal dimensions over the dimensions normally attainable from baking the unglazed raw dough.” Lonergan 3:29 to 4:1 (emphasis supplied).

With respect to the first alternative advantage of the disclosed process, the unbaked dough product can include products “wherein it is desirable to achieve organoleptic properties, including taste and texture, that heretofore have required that the dough product be fried.” Lonergan 4: 17-20. “[T]he application of the . . . glaze to dough products, followed by baking, mimics the frying step which is traditionally used in the production process of certain dough products.” Lonergan 3:7-9. The glaze “mimics the effects of frying during baking by maintaining excess heated oil on the surface of the dough product during baking, so that the crust effectively ‘fries’ in the oven,” producing “a fried organoleptic quality, which mimics the taste and texture of fresh fried products.” Lonergan 8:29 to 9:9. The coated dough product “may be prepared in final form by any bakery, restaurant or individual consumer with a conventional oven.” Lonergan 3:15-18.

Lonergan discloses the dough product can be, among other things, “a doughnut” which can be “frozen, refrigerated, or fresh.” Lonergan 4:1-4. In this respect, the dough product can contain the usual ingredients including, among other things, yeast. Lonergan, e.g., 5:7 to 15. “As used herein, ‘frying’ includes deep-frying, a cooking method that is used on such products as . . . doughnuts,” as well as “pan-frying in more limited amounts of oil prior to baking which also provides a crisp surface crust to the dough” in products including, among other things, pizzeria pizzas. Lonergan 9:10-16.

We find Lonergan would have further disclosed with respect to the second alternative advantage of the disclosed process, “[t]he dimensions, or product geometry, of a baked dough product are related to the dimensions of

the raw dough product,” and while “[t]raditionally, to obtain a baked product with a desired specific volume or geometry, the dough would have to obtain a certain geometry just prior to baking,” the baked, coated dough product “can increase . . . [in] the horizontal dimensions . . . over that which would be expected based on the dimensions of the dough product before baking.” Lonergan 3:19-25. Lonergan discloses that “simply by glazing a dough product prior to baking, the proper taste, texture, final baked product geometry and specific volume can be achieved, without a thawing or proofing step or, when traditionally required, a frying step,” and “that the glaze on the dough’s surface additionally acts to keep the outer surface of the dough malleable, therefore delaying the setting of the outer dough structure.” Lonergan 9:3-7. Lonergan discloses “because the presence of additional oil on the surface of the glazed dough allows the surface to remain malleable, the dough can expand further during baking than is achieved when baking an unglazed dough product.” Lonergan 9:17-19. Lonergan illustrates the process with respect to the second advantage with yeast containing pizza crust dough, and reports that when “the amount of glaze increased from 0% to 10%, the baked diameter increased in relation to the amount of the glaze.” Lonergan, 10:1 to 14:24.

We find Averbach would have disclosed to one of ordinary skill in this art a process of coating a food product with a moisture barrier consisting essentially of fats and an edible wax, which, among other things, inhibits moisture from exiting or entering the food product. Averbach, e.g., col. 2, l. 60-64, col. 3, ll. 15-17, and 26-32. “The food product may be cooked such as by baking, frying,” including “baked good such as brownies” and “fried goods such as doughnuts, honeybuns, and other raised dough products.”

Averbach, col. 3, ll. 17-26. The fat and wax mixture have melting points of at least 90°F and are applied to the food product in the molten state in any manner that coats the product, including crevices, and allowed to cool to form a continuous, thin, pliable film. Averbach, e.g., col. 2, l. 64, to col. 3, l. 14, col. 3, l. 33, to col. 5, l. 30. Averbach illustrates the process using “[d]oughnuts made from a yeast-raised dough” which are coated and then glazed, wherein the coating inhibits moisture from the doughnut from being absorbed by the glaze. Col. 8, l. 58 to col. 9, l. 12; *see also* col. 1, ll. 32-48. The applied coating does not change the taste of the doughnuts. Averbach, e.g., col. 9, ll. 13-17. Averbach also discloses “making doughnuts in a commercial doughnut machine” with which “[a] batch of doughnuts is prepared, coated, and glazed.” Averbach col. 9, ll. 18-22.

We find Loh acknowledges that

[c]ommercially, donuts fall into two broad categories: cake donuts, leavened by a baking powder chemical reaction which produces carbon dioxide, and yeast-raised donuts, leavened by yeast enzymes which react with sugar during fermentation to produce carbon dioxide and ethyl alcohol. Conventional cake donuts are prepared from a batter which is deposited into hot oil for frying. Yeast-raised donuts are produced from a dough which is permitted to ferment before being fried in hot oil.

Loh, col. 1, ll. 15-23. Loh would have disclosed to one of ordinary skill in this art a process of producing low-fat cake donuts using a dough with a moisture content of 20-30% and a thermally-reversible gel, and forming donut-shaped dough pieces which are then placed on a baking surface and baked. “The moisture content of the dough and the resulting donut is

maintained at a relative high level, before, during and after baking.” Loh, e.g., col. 1, l. 26 to col. 3, l. 24. Loh discloses

In order to prevent undesirable crust formation during baking, which might preclude proper expansion and structure formation, a high moisture content must be maintained for the dough at least during the initial stages of baking. Surface moisture is therefore added to the dough. Preferably, the dough is sprayed with water as it passes into the oven. Desirably the oven is also equipped with steam and/or water injectors for adding moisture to the oven during at least the first half of the baking cycle. During baking, the moisture content of the donut is reduced from the moisture content of the raw dough by less than 8 . . . percentage points

Loh, col. 3, ll. 26-38.

We found above that Appellants acknowledge methods for making yeast raised doughnuts including deep frying in oil were known in this art. Spec. 1:23 to 2:16, and Fig. 1; *see above* p. 4. This method includes the steps of fermenting the dough; cutting the dough into doughnut shapes prior to proving; proving the dough during which it doubles in size, and frying the proven doughnuts. Spec. 2:3-15 and Fig. 1. Appellants further acknowledge that ovens equipped with steam systems were known and commercially available. Spec. 9, ll. 5-21.

We find Silva would have disclosed to one of ordinary skill in this art a process of applying a water in oil emulsion or colloidal dispersion prepared from an acetylated monoglyceride, triglyceride, or an emulsifier in aqueous solution with a soluble saccharide or polysaccharide, to, among other things, yeast raised donuts. Silva, e.g., col. 6, ll. 27-66, and col. 7, l. 31 to col. 9, l. 38. “The surface temperature of the donut at the time of application of the coating should be between 90° to 100° F. so that the

coating material will set substantially rapidly but will not penetrate too deeply into the surface of the donut, while producing a thin, uniform coating which does not interfere with the eating characteristics of the donut.” Silva, col. 6, l. 67 to col. 7, l. 9.

We determine the combined teachings of Lonergan and Averbach, the scope of which we determined above, provide convincing evidence supporting the Examiner’s case that the claimed invention encompassed by claim 1, as we interpreted this claim above, would have been *prima facie* obvious to one of ordinary skill in the baking arts familiar with making cake doughnuts and yeast-raised doughnuts. Indeed, on this record, this person would have been armed with the knowledge in the art with respect to processes for preparing suitable dough, including the leavening step, such as proving; the shaping of dough pieces suitable for the method of baking and frying; and the effects of baking and frying the dough pieces using suitable coatings and baking conditions, to obtain cake and yeast-raised doughnuts. This person would have employed commercial doughnut machines and ovens for this purpose in the kitchens of bakeries, including franchise bakeries producing predominately doughnut products. Thus, this person is “not the casual baker,” as Appellants contend (Reply Br. 2), and indeed, would not have been “‘stumped’” by the disclosure of Lonergan, contrary to Appellants’ contentions (Reply Br. 2-3), or by the disclosures of Averbach and of Loh.

We are of the opinion that, as the Examiner contends, *prima facie*, Lonergan would have led one of ordinary skill in this art to coat shaped yeast-raised and proofed dough for doughnuts with the disclosed glaze mixture and bake the coated dough to obtain a yeast-raised and proofed

doughnut with a surface which mimics, at least to some extent, the organoleptic qualities of taste and texture of a deep-fired yeast-raised and proofed doughnut product.⁴ We further are of the opinion that, as the Examiner contends, Averbach would have led this person to further coat this baked yeast-raised and proofed doughnut product with the disclosed moisture barrier composition to prevent moisture from the baked doughnut from being absorbed by a subsequently applied glaze or coating. Thus, this person would have applied the moisture barrier coating to a doughnut product in the course of a doughnut production operation immediately after the doughnut is prepared and thus is still warm from the cooking step.

Accordingly, as the Examiner contends, *prima facie*, one of ordinary skill in this art routinely following the combined teachings of Lonergan and Averbach would have reasonably arrived at the claimed process encompassed by claim 1 without recourse to Appellants' Specification. *See, e.g., KSR Int'l Co. v. Teleflex Inc.*, 127 S.Ct. 1727, 1739 (2007) (a patent claiming a combination of elements known in the prior art is obvious if the improvement is no more than the predictable use of the prior art elements according to their established functions); *In re Kahn*, 441 F.3d 977, 985-88 (Fed. Cir. 2006); *In re Keller*, 642 F.2d 413, 425 (CCPA 1981) (“[T]he test [for obviousness] is what the combined teachings of the references would have suggested to those of ordinary skill in the art.”); *Sovish*, 769 F.2d at 743 (skill is presumed on the part of one of ordinary skill in the art); *In re*

⁴ It is well settled that a reference stands for all of the specific teachings thereof as well as the inferences one of ordinary skill in this art would have reasonably been expected to draw therefrom, *see In re Fritch*, 972 F.2d 1260, 1264-65 (Fed. Cir. 1992); *In re Preda*, 401 F.2d 825, 826 (CCPA 1968), presuming skill on the part of this person. *In re Sovish*, 769 F.2d 738, 743 (Fed. Cir. 1985).

Bozek, 416 F.2d 1385, 1390 (CCPA 1969) (“Having established that this knowledge was in the art, the examiner could then properly rely, as put forth by the solicitor, on a conclusion of obviousness ‘from common knowledge and common sense of the person of ordinary skill in the art without any specific hint or suggestion in a particular reference.’”); *see also In re O’Farrell*, 853 F.2d 894, 903-04 (Fed. Cir. 1988) (“For obviousness under § 103, all that is required is a reasonable expectation of success.” (citations omitted)).

Upon reconsideration of the record as a whole in light of Appellants’ contentions, we are of the opinion that Appellants have not successfully rebutted the prima facie case. Appellants’ view of the disclosure of Lonergan is unduly restrictive. Indeed, we agree with the Examiner that one of ordinary skill in this art would have found in this reference the teachings that the process is applicable to shaped, yeast-raised, proven dough that is formed as known in the prior art to the extent that the dough is then ordinarily deep-fried to form yeast-raised donuts. Ans. 3-4, 6, and 7-9. This person would have further recognized that Lonergan’s teachings with respect to the alternative process that increases horizontal growth when glaze coated yeast dough products, such as pizza crusts, are baked, does not pertain to products that are prepared to the extent that the same are in condition for deep-frying. *See* App. Br., e.g., 8-9, 10-15, and 19; Reply Br., e.g., 2-4. We also agree with the Examiner (Ans. 4-5, 6-7, and 9-12) that contrary to Appellants’ contentions relying on Silva (App. Br. 15-18; Reply Br. 4-6), one of ordinary skill in this art would have found in Averbach the teachings to apply the barrier coating composition taught therein when the yeast-raised doughnut is still warm from the cooking step because the reference teaches

applying the coating to the doughnut in a production process. Accordingly, the combined teachings of Lonergan and Averbach would have disclosed the claimed invention as a whole encompassed by claim 1 to one of ordinary skill in this art.

Turning now to the ground of rejection of claim 13, the combined teachings of Lonergan, Averbach, and Loh, the scope of which we determined above, provide convincing evidence supporting the Examiner's case that the claimed invention encompassed by claim 13, as we interpreted this claim above, would have been *prima facie* obvious to one of ordinary skill in the baking arts familiar with making cake doughnuts and yeast-raised doughnuts. We agree with the Examiner that this person would have recognized that in baking a glaze coated shaped, proven, yeast-raised dough according to Lonergan, the moisture on the surface of the baking, glaze-coated dough is necessary during the first half of the baking cycle to prevent undesirable crust formation. Indeed, as the Examiner points out, Loh would have suggested to this person that baking leavened dough products such as the baking of cake doughnut dough with the application of moisture to the baking dough product with steam in a suitably equipped oven can accomplish such result. Ans. 5 and 13.

Accordingly, as the Examiner contends, *prima facie*, one of ordinary skill in this art routinely following the combined teachings of Lonergan, Averbach, and Loh would have reasonably arrived at the claimed process encompassed by claim 13 without recourse to Appellants' Specification. *See, e.g., KSR*, 127 S.Ct. at 1739; *Kahn*, 441 F.3d at 985-88; *Keller*, 642 F.2d at 425; *Sovish*, 769 F.2d at 743; *Bozek*, 416 F.2d at 1390; *see also O'Farrell*, 853 F.2d at 903-04.

Upon reconsideration of the record as a whole in light of Appellants' contentions, we determine Appellants have not successfully rebutted the *prima facie* case. We cannot agree with Appellants that one of ordinary skill in this art would not have looked to Loh with respect to the teachings of Lonergan. App. Br. 22; Reply Br. 6-7. As the Examiner contends, Lonergan teaches baking glaze coated proven yeast-raised dough and Loh teaches baking cake doughnut dough, and one of ordinary skill in this art would have recognized that both involve surface structure formation even in view of the glaze coating on Lonergan's dough. This person would have been led by Loh to provide suitable moisture via steam to the dough surface during the first part of the baking cycle of Lonergan's glaze coated proven yeast-raised dough in the reasonable expectation of obtaining a suitable crust structure for that baked doughnut product. *See, e.g., KSR*, 127 S. Ct. at 1740 ("if a technique has been used to improve one device, and a person of ordinary skill in the art would recognize that it would improve similar devices in the same way, using the technique is obvious unless its actual application is beyond his or her skill").

Accordingly, based on our consideration of the totality of the record before us, we have weighed the evidence of obviousness found in the combined teachings of Lonergan and Averbach alone and as further combined with Loh with Appellants' countervailing evidence of and argument for nonobviousness and conclude that the claimed invention encompassed by appealed claims 1, 3 through 9 and 11 through 14 would have been obvious as a matter of law under 35 U.S.C. § 103(a).

We do not reach the same result with respect to the claimed invention encompassed by claim 2 and by claims 15 through 22. We interpreted these

claims above to require the first cooking fat and the first and second cooking fats, respectively, to consist of only cooking fats, as the Specification contains a specific definition for the language “consisting essentially of cooking fat” as limited to “cooking fat.” *See above* pp. 6-7. The Examiner has not so considered the subject claim language. Ans. 4 and 12-13. Therefore, the Examiner has not addressed the difference between the claimed processes encompassed by these claims and those of Lonergan and Averbach, which is in the ingredients in the compositions applied to the surface of the dough before and after baking. Thus, because the Examiner has not established that one of ordinary skill in this art would have applied a composition consisting essentially of cooking fat as claimed, as Appellants contend (App. Br. 20-22; Reply Br. 7-8), the Examiner has also not established a prima facie case of obviousness within the meaning of § 103(a).

Accordingly, we reverse the ground of rejection of claims 2 and 15 through 22 under 35 U.S.C. § 103(a) over the combined teachings of Lonergan and Averbach alone and as further combined with Loh.

The Primary Examiner’s decision is affirmed-in-part.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv)(2007).

AFFIRMED-IN-PART

Appeal 2008-0746
Application 10/624,062

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